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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 51.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, *et al.*,

Appellants,

—vs.—

CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK.

BRIEF OF APPELLANTS IRVING TRUST COMPANY AND THOMAS F. McGLONE, JR., AS EXECUTORS OF THE ESTATE OF JOHN J. McGLONE, DECEASED, THOMAS F. McGLONE AND ROSE McGLONE MEREDITH.

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Counsel for Appellants,
Irving Trust Company and Thomas
F. McGlone, Jr., as Executors, etc.,
Rose McGlone Meredith and Thomas F. McGlone.

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I.

THE OPINIONS OF THE COURT BELOW.

The opinion in the Surrogate's Court is reported in 171 Misc. 612, 13 N. Y. S. (2d) 76 (R., 23).

The opinion in the Appellate Division is reported in 258 App. Div. 596, 17 N. Y. S. (2d) 316 (R., 42).

The opinion in the Court of Appeals is reported in 284 N. Y. 527, 32 N. E. (2d) 539 (R., 49).

II.

JURISDICTION.

1. The date of the final decree to be reviewed is January 24th, 1941 (R., 55).

2. The jurisdiction of this Court is invoked by reason of the rulings of the Court of Appeals: (a) that the provisions of Sub. 9, Sec. 18 of the Decedent Estate Law (Chap. 229, Sec. 4, Laws of 1929, as amended by Chap. 174, Sec. 1, Laws of 1930), are not in conflict with and violation of Section 10, Article I of the Constitution of the United States, and Section 1 of the Fourteenth Amendment thereof (R., 52, 53); (b) that the testator, John J. McGlone, did not acquire, by the instrument executed in 1922 in contemplation of marriage, contractual rights protected by the Constitution of the United States, which have been invaded by Sec. 18, Sub. 9 of the Decedent Estate Law (R., 52); (c) that an agreement made before the effective date of the new statute is not enforceable unless it was executed with the formalities provided therein (R., 53).

3. The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States are Sections 344 (a) and 350, Title 28 of the U. S. Code.

4. The cases which sustain the jurisdiction of the Supreme Court of the United States are *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 258; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478; *Smith* v. *Cahoon*, 283 U. S. 553; *Vero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285; *Hartford Steam Boiler Co.* v. *Harrison, Insurance Commissioner*, 301 U. S. 459; *American Toll Bridge Co.* v. *Railroad Comm.*, 307 U. S. 486; *Curry* v. *McCanless*, 307 U. S. 357; *Indiana, ex rel Anderson* v. *Brand*, 303 U. S. 95.

III.

STATEMENT OF THE CASE.

On February 2, 1922 Helena Day Snyder and John J. McGlone, both citizens of the United States, were in London. On that day she executed and delivered to him an instrument in script, on a letterhead of the Savoy Hotel, reading as follows:

> "The Beverleys,
> Osterley, Middlesex, England
> February 2—1922.
>
> Savoy Hotel,
> London
> WC 2
>
> I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.
>
> Helena Day Snyder"

(R., 16A, 17).

They were married on February 4, 1922 (R., 10). This was his first and her third marital venture (R., 10). The authenticated record of the marriage discloses that he was forty-seven years old, and that she represented her age to be forty-five years (R., 22A). It appears from the admissions in the pleadings that her real age at the time was sixty-two (R., 10, 17). She had no children by her prior marriages, nor was there any issue from this one (R., 10).

Her signature on the aforementioned document was conceded to be valid. The delivery thereof to Mr. McGlone at the time of its execution was admitted (R., 17). The document contains internal evidence that Mrs. Snyder possessed an independent fortune and that she understandingly and voluntarily renounced all interest in the estate of her prospective husband (R., 16A).

On August 21, 1930 Mr. McGlone made his Last Will and Testament (R., 14). This was prior to the effective date of Section 18 of the Decedent Estate Law.

The third paragraph of the Will reads as follows:

> "THIRD: My dear wife, HELENA DAY McGLONE, being in possession of ample funds of her own and having waived all claim of dower or participation in any part of my estate, I nevertheless desire that there shall be paid over to her out of my estate the sum of Two Thousand ($2,000.00) Dollars, or if she should prefer, then at her request instead of the payment of Two Thousand ($2,000.00) Dollars, my Executors shall purchase for her and deliver to her any piece of jewelry which she may select costing up to Two Thousand ($2,000.00) Dollars, as a slight token of my love and affection for her and admiration of her noble and high traits of character" (R., 13).

On July 6, 1934 (after the effective date of Section 18 of the Decedent Estate Law) Mr. McGlone executed a Codicil to the Last Will and Testament (R., 15, 16). This Codicil did not disturb the foregoing provision of the Will.

Mr. McGlone died on February 22, 1937. He left him surviving his widow, Helena Day McGlone, a sister, Rose McGlone Meredith, two brothers, Thomas F. McGlone and Ignatius V. McGlone, and three nephews, Thomas F. McGlone, Jr., Edward McGlone and Robert McGlone, the last two then being infants over the age of fourteen years (R., 9). His said Last Will and Testament and Codicil thereto were admitted to probate on April 8, 1937 on which date Letters Testamentary were issued to appellants, Irving Trust Company and Thomas F. McGlone, Jr. (R., 9).

On September 23, 1937 Mrs. McGlone served a notice of election to take her share of the estate as in intestacy pursuant to the provisions of Section 18 of the Decedent Estate Law. The executors then commenced this proceeding, pursuant to Section 145a of the Surrogate's Court Act, to determine the right of the widow to so elect. The infants, Robert McGlone and Edward McGlone, by their Special Guardian, and said Ignatius V. McGlone, Thomas F. McGlone and Rose McGlone Meredith filed answers consenting to a decree as prayed for in the executors' petition (R., 18, 19). Mrs. McGlone served an answer, which was amended by stipulation (R., 17). The answer did not contain any affirmative defense. A motion for judgment on the pleadings was made by all parties (Papers on Appeal, *In re McGlone's Will*, 256 App. Div. 1074, 11 N. Y. Supp. (2d) 3). This motion was denied by the Surrogate upon the ground that a presumption of fraud flows from the mere relationship of the parties and that it was necessary for the petitioners to plead and prove as part of their *prima facie* case that the agreement was not induced by fraud or inequitable conduct. The order denying the motion for judgment on the pleadings was affirmed by the Appellate Division, but that Court reversed the Surrogate on the law of the case, holding:

> "In the opinion of this court no presumption exists by reason of the relation existing between the parties, at the time the paper writing was made and delivered. (*Matter of Rogers*, 250 App. Div. 26.) The burden of pleading inequality, fraud or over-reaching is upon the widow."

Mrs. McGlone did not amend her answer.

The case was tried on May 25, 1939. In presenting their *prima facie* case petitioners relied upon the admissions in the pleadings and three documents which were received in evidence without objection. The first of these was the stipulation dated September 14, 1938, by which Mrs. McGlone admitted the delivery to Mr. McGlone of the paper writing above referred to at the time of its execution, and amended

her answer accordingly (R., 17, 19). The second was the aforementioned agreement signed by Mrs. McGlone, then Helena Day Snyder (R., 16A, 20). The third was the authenticated record of the marriage (R., 20, 22A). Mrs. McGlone offered no proof whatever. The Surrogate decided that Mrs. McGlone had not waived or released her right to elect under Section 18 of the Decedent Estate Law, and had effectively exercised such right of election.

Mrs. McGlone died after the trial and entry of the original decree, and the proceeding thereafter became a contest between the brothers, sister and nephews of Mr. McGlone, and the next of kin of Mrs. McGlone (R., 42).

The Appellate Division unanimously reversed on the law and the facts, and a decree was made by the Surrogate on March 15, 1940 as prayed for in the executors' petition (R., 36). The Appellate Division found and held that the agreement was made by Mrs. McGlone voluntarily, understandingly and under circumstances which were free from inequality and unfairness (R., 44, 45); that it was made to induce the marriage (R., 45); that the marriage constituted the consideration (R., 48); that the instrument was valid under the statutes in existence at the time it was made, which did not require an acknowledgment (R., 46); that when said instrument was executed on February 2, 1922 there vested under it in the testator certain contract rights; and that by prescribing a form of execution more exacting than that required by pre-existing statutes, Sec. 18, Sub. 9 of the Decedent Estate Law, violated previously vested rights under agreements theretofore made, whose form complied with the earlier statutes (R., 47, 48).

Chase L. Day, as Executor under the Last Will and Testament of Helena Day McGlone, deceased, then appealed to the Court of Appeals. That court reversed the order of the Appellate Division and decree of the Surrogate entered thereon, and confirmed the original decree of the Surrogate (R., 54). A final decree, on the remittitur of the Court of Appeals, was thereupon entered in the Surrogate's Court on January 24, 1941 (R., 55). The Court of Appeals did not

disagree with the findings or opinion of the Appellate Division, except its conclusion that the statute is repugnant to the Constitution of the United States, and invaded contract rights which vested in the testator prior to its enactment.

On March 27, 1941 the Chief Judge of the Court of Appeals made an order allowing an appeal to the Supreme Court of the United States. The appellee moved to dismiss the appeal. On May 12, 1941 an order was made noting probable jurisdiction.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals erred in holding

(a) that the provisions of Sub. 9, Sec. 18 of the Decedent Estate Law (Chap. 229, Sec. 4, Laws of 1929, as amended by Chap. 174, Sec. 1, Laws of 1930) are not in conflict with and violation of Section 10, Article 1 of the Constitution of the United States, and Section 1 of the Fourteenth Amendment thereof;

(b) that the decedent John J. McGlone did not acquire, by the instrument executed by Helena Day McGlone (then Helena Day Snyder), on February 2, 1922, contractual rights, protected by the Constitution of the United States, which have been invaded by Sub. 9, Sec. 18 of the Decedent Estate Law;

(c) that the contractual rights acquired by the testator John J. McGlone under said instrument dated February 2, 1922 did not include the right to exclude his wife, Helena Day McGlone, from any share in his estate;

(d) that the instrument dated February 2, 1922 executed by Helena Day McGlone may not be given effect as a waiver of a right to succeed to property of her husband which the Legislature might thereafter create;

(e) that an agreement in contemplation of marriage within the meaning of Sec. 53 of the Domestic Relations Law, made before the effective date of Sec. 18, Sub. 9 of the Decedent Estate Law, and executed in a manner which satisfies the requirements of Sec. 31 of the Personal Property Law, whereby an intended wife waived or released all rights and interest in the estate of her prospective husband, is unenforceable if not acknowledged as provided by Sec. 18, Sub. 9 of the Decedent Estate Law; and

(f) that the facts in the case did not give rise to an estoppel or other equitable ground for denying to Helena Day McGlone her statutory right to elect as provided in Sec. 18 of the Decedent Estate Law.

V.

ARGUMENT.

Summary of Argument.

Point A: The agreement made on February 2, 1922 was valid under the laws in force at the time it was made, which did not require an acknowledgment. It is in writing and was subscribed by Mrs. McGlone. By its terms Mrs. McGlone renounced all right, title and interest she might legally or otherwise have in any real or personal property of which her prospective husband might die seized. It was made eight years before the enactment of Sec. 18 of the Decedent Estate Law, by which a surviving spouse is given a right of election to take his or her share of the estate of the other spouse as in intestacy. Subdivision 9 (as amended by Chap. 174, Sec. 1, Laws of 1939) provides that an agreement "so executed" made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section. The words "so executed" incorporate by reference the requirement contained in the preceding sentence that the subscription shall be "duly acknowledged".

The purpose of this provision was to save agreements previously executed. However, the language went beyond this purpose and prescribed a form of execution more exacting than that required by pre-existing statutes (Sub. 3, Sec. 31, Personal Property Law, Sec. 53, Domestic Relations Law), through which contract rights vested in the testator under the instrument of February 2, 1922 which were acted upon by him at the time of the marriage on February 4, 1922. The subsequent enactment consequently violated the testator's constitutional rights.

Point B: Under the agreement herein Mr. McGlone acquired a vested right to exclude Mrs. McGlone from claiming any interest in his estate. There is no rule of law or principle of public policy which prevents husband and wife from fixing by agreement, before marriage the rights which they shall have in each other's property, and relinquishing the interests which they would otherwise acquire by virtue of the marriage. Such a contract is as much within the protection of the fundamental law as any other. The agreement in the case at bar was not limited to a waiver of dower, nor was its efficacy contingent upon Mr. McGlone dying intestate. Under its terms Mrs. McGlone relinquished all right, title and interest she would have acquired through marriage in any real or personal property of which her prospective husband might die seized. The nature of the right she would have acquired, but for the agreement, is immaterial. It might be diminished or enlarged by subsequent legislation without affecting her rights in any way, because she had released all interest in his estate. The Legislature could not, without constitutional infringement, give her any rights in derogation of the vested contract rights which the testator and his estate had already acquired. The release of a future right is equivalent to a covenant not to enforce the right whenever it arises. The right to enforce performance of this covenant was impaired and taken without due process of law.

Point C: The agreement herein complies with the provisions of Sub. 9, Sec. 18 of the Decedent Estate Law, so far as the same is valid. It is an agreement releasing or waiving all rights in the estate of the other spouse, within the meaning of this statute. The history of the section shows that any type of agreement is proper. There is no requirement that the agreement be "mutual" or "bi-lateral". The statute does not require the complete terms of the arrangements between the parties to be set forth, nor that a consideration be stated. Essentially the term "agreement" as used in this section, means an agreement on the part of the surviving spouse surrendering his or her right, and the signature of such spouse alone is sufficient.

Point D: The instrument of February 2, 1922 was made to induce the marriage. It had a valid consideration. The marriage constituted that consideration. It recites the coming marriage on February 4, 1922, and was made in contemplation thereof. The form of the agreement indicates that the parties believed there was a consideration and intended to affect their legal relations. The natural consequence of Mrs. McGlone's promise was to induce the marriage. Until the marriage took place she was not bound. Where marriage is the consideration it need not be recited in the agreement. The latter will be enforceable so long as the marriage is actually solemnized. Marriage is a consideration of the highest value.

Point E: Whether the instrument of February 2, 1922 be deemed an agreement, a grant, release or even a gift, the rights which vested thereunder in the testator and are within the constitutional guaranty against the impairment of the obligations of contract and the taking of property without due process of law. Upon the consummation of the marriage Mr. McGlone acquired the right to prevent his wife from claiming any part of his estate—this was an immediate and fixed right of future enjoyment; and Mrs. McGlone became obligated to perform her promise not to assert any right to

his estate. This was a contract concerning property and conferring rights which may be asserted in a court of justice. Any change in the law which materially impaired the means of legally enforcing the agreement, necessarily altered its obligation in violation of the Constitution.

Point F: The agreement herein was an express, deliberate and informed waiver of Mrs. McGlone's rights. Mr. McGlone twice altered his position relying thereon. First, by marrying her, and second, by the execution of a codicil to his Will, after the effective date of the new statute. It is unfair and inequitable to permit Mrs. McGlone, after his death, to repudiate the arrangement into which she voluntarily entered. She is estopped from asserting any claim to his estate.

Point G: The appellants made out a *prima facie* case upon the trial, and since Mrs. McGlone failed to present any proof, they were entitled to judgment. It is the law of the case that no presumption exists by reason of the relation of the parties, and that the burden of pleading fraud, inequality or over-reaching is upon Mrs. McGlone. She did not so plead, and there was no such issue at the trial. Mrs. McGlone offered no evidence indicating that she dealt with her prospective husband under circumstances of inequality. It was therefore unnecessary for appellants to prove, as part of their *prima facie* case, that she was not coerced or defrauded. In the absence of fraud, a person signing an agreement such as this is charged with knowledge of its character and contents. The unchallenged proof that it was genuine was sufficient to establish *prima facie* that it was binding upon Mrs. McGlone.

POINT A

BY PRESCRIBING A FORM OF EXECUTION MORE EXACTING THAN THAT REQUIRED BY PRE-EXISTING STATUTES, SUBDIVISION 9, SECTION 18 OF THE DECEDENT ESTATE LAW, VIOLATED VESTED CONTRACT RIGHTS UNDER AGREEMENTS MADE BEFORE ITS EFFECTIVE DATE WHOSE FORM COMPLIED WITH THE EARLIER STATUTES.

Although the law fixes the rights of a husband and wife in each other's property, persons possessing requisite legal capacity, may, by an antenuptial agreement, exclude the operation of law, and determine for themselves what rights they will have in each other's property, during the marriage and after its termination by death. The rights of either spouse in the estate of the other under the statutes of descent and distribution may be released or barred. This is the prevailing judicial sentiment, as the following authorities will abundantly show

Appleby v. *Appleby*, 100 Minn. 408 at 419;
Bibelhausen v. *Bibelhausen*, 159 Wisc. 365 at 372;
McNutt v. *McNutt*, 116 Ind. 545, 549;
Richard v. *Detroit Trust Co.*, 269 Mich. 411;
Vaill, et al. v. *Maurer*, 25 Md. 532;
Moore v. *Harrison*, 26 Ind. App. 408 at 411;
In re Estate of Thorman, 162 Iowa 316;
Burns v. *Spiker*, 109 Kan. 22;
13 Ruling Case Law, pp. 1012, 1013;
Tiffany on Persons and Domestic Relations, p. 151.

In *Appleby* v. *Appleby*, 100 Minn. 408, the Court said at 419:

> "The property rights of each party may be thus definitely fixed and determined in advance, each being left to control and manage his or her separate property as if unmarried; and this, notwithstanding the statutory provisions fixing the relative rights of each in and to the property of the other. The statutes upon

> that subject are superseded by the contract which becomes absolute upon the consummation of the contemplated marriage."

This has long been the law in the State of New York. At the time the agreement in the case at bar was made, a contract between a man and woman, in contemplation of marriage, by which either one relinquished all rights in the estate of the other, was fully recognized and enforced by the Courts of this state; nor was there any law, statutory or otherwise, which required such a contract to be acknowledged.

> *Pierce* v. *Pierce*, 71 N. Y. 154;
> *Young* v. *Hicks*, 92 N. Y. 235 at 238;
> *Johnston* v. *Spicer*, 107 N. Y. 185, 191.

In *Pierce* v. *Pierce*, 71 N. Y. 154, the Court of Appeals said:

> "Antenuptial contracts whereby the future wife releases her claim to her right of dower, and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition they will be enforced by the courts."

And in *Johnston* v. *Spicer*, 107 N. Y. 185 at 191, the same Court said:

> "No especial formality is requisite in such instruments."

Section 31 of the Personal Property Law then provided and still provides that every agreement in consideration of marriage, except mutual promises to marry, must be in writing and subscribed by the person to be charged therewith, and Section 53 of the Domestic Relations Law then provided and still provides that a contract made between persons in contemplation of marriage remains in full force after the

marriage takes place. These were the only statutory provisions applicable to the agreement in the case at bar, in effect when it was made. The agreement is in writing and subscribed by the person sought to be charged therewith, but was not acknowledged. Its language is not ambiguous. It clearly evidences Mrs. McGlone's intention to relinquish every right and interest in Mr. McGlone's estate.

The agreement was executed and delivered eight years before the effective date of Section 18 of the Decedent Estate Law. This statute provides that when a person dies after August 31, 1930, and leaves a Will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy. Subdivision 9 of this statute, as originally enacted (Chap. 229, Sec. 4, Laws of 1929), formerly read as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement of settlement so executed, made before or after marriage."

The following year Subdivision 9 was amended (Chap. 174, Sec. 1, Laws of 1930) by the elimination of the words "of settlement", so that the form of the instrument remained by statutory direction merely an agreement, and by the addition of a new sentence at the end of the subdivision. Subdivision 9 as amended reads as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agree-

ment so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

The purpose of the amendment was explained by Surrogate Foley in *In re Moore's Estate*, 165 Misc. 683, affirmed 254 App. Div. 856, affirmed 280 N. Y. 733. At pages 687 and 688 the Surrogate said:

"The purpose of this new sentence was to give legal recognition to an agreement by which a husband or wife had waived all rights in the estate of the other spouse in an instrument executed before September 1, 1930. The change of the form of the subdivision from an 'agreement of settlement' to a mere 'agreement' of any kind is significant in the solution of the controversy here. It is illuminative of the intent of the Decedent Estate Commission which recommended it, and of the Legislature which enacted it, to authorize a form of instrument other than an antenuptial or postnuptial agreement of settlement. The footnote printed in the legislative bill indicates the broadened scope of the document to be employed. The waiver might be embodied in a trust deed executed by the husband or wife for the benefit of the other, or in a separation agreement, or in any other form of agreement. Cases were visualized where either spouse might before or after marriage waive his or her rights to take against any will without any consideration. Either might possess an independent fortune. In such case, the husband might be entirely willing to permit the wife to dispose of her own property as she pleased. The wife might be willing to do likewise. Joint execution of the agreement was never contemplated. The husband might be willing to waive his right to take against any will of his wife. A single instrument executed by him alone would be sufficient. Her right to take against any will of his might thus be preserved. In other words both could arrange for the disposition of the property of either by a joint agreement, or by an antenuptial agreement, or by a separation agreement, or by a trust deed or by an agreement in the form of a release, such as is presented in the

> pending proceeding, signed by one of the spouses only. The word used in the subdivision comprehends and includes many other forms of agreements unnecessary to specify here. Essentially the term applies to an agreement on the part of the party surrendering the right and his or her signature only is sufficient."

Although the purpose of the sentence was to save agreements previously executed, it is obvious that the language went beyond this purpose and prescribed a form of execution more exacting than that required by pre-existing statutes, and consequently violated vested rights under agreements, previously made, whose form complied with the earlier statutes. The words "so executed" should be deleted from the new sentence. Such deletion would not alter the legislative purpose to save agreements previously executed. With such deletion the sentence would become declaratory of the pre-existing statute law (Sec. 31, Sub. 3, Personal Property Law, Sec. 53, Domestic Relations Law) through which contract rights vested in the testator under the instrument of February 2, 1922, which were acted upon at the time of the marriage on February 4, 1922.

The Court of Appeals held that since the Legislature had the power to create for the benefit of a spouse a new right of succession to property, it was also empowered to provide that a spouse could not waive the benefit of that right except by an instrument executed with the formalities set forth in the statute. The Legislature undoubtedly had the power to change the rights of descent and distribution, but it could not take away or invade vested rights under existing contracts which were executed with the formalities required by the statutes in force when the contract was made.

It is the law in force at the time a transaction is consummated and made effectual that must be looked to as determining its validity and effect.

> *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609 at 623.

In *Ralph* v. *Crouk*, 266 N. Y. 428, the Court of Appeals held that a statute declaring void every agreement which is not to be completely performed before the end of a lifetime, or which is a contract to bequeath property or make a testamentary provision, unless such agreement or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith or by his lawful agent, is inapplicable to contracts existing at the date of its passage.

In *Matter of Goldberg*, 275 N. Y. 186, the same Court said at page 189:

> "This agreement to marry and to make a Will was not in writing. It rests entirely upon oral testimony. If it were a valid agreement in view of section 31, subdivision 3, of the Personal Property Law (Cons. Laws, ch. 41), binding upon both parties, a subsequent statute passed almost two years later making such an agreement void would, no doubt, be unconstitutional."

In *Hamrick* v. *Barton*, 16 Wall. 166, this Court held that a title which has once become vested cannot be divested by any subsequent change of laws as to forms or solemnities of conveyance.

The decision of the Court of Appeals has not only rendered the agreement in the case at bar unenforceable, but has also nullified all unacknowledged agreements of every kind, made before the effective date of Sec. 18 of the Decedent Estate Law, by the terms of which a spouse or prospective spouse has waived or released all rights in the estate of the other spouse. This decision will also unquestionably result in confusion and uncertainty as to the validity and effect of future agreements of a similar nature, even though acknowledged. Let us assume, for example, that a man and woman enter into an agreement today, in contemplation of marriage, under which either one releases all interest in the estate of the other, and that the agreement is subscribed and acknowledged as provided by Sub. 9, Sec. 18 of the Decedent Estate Law, and let us further assume that ten years later the Legislature again changes the rights of descent and distribution,

and provides that such rights may be waived only by an agreement executed in the presence of two attesting witnesses, each of whom shall sign his name as a witness at the end of the instrument. Under the decision of the Court of Appeals in the case at bar this agreement, though valid when made, would become unenforceable.

The decision of the Court of Appeals has provided persons of designing disposition, who have signed away their rights, the means of escaping the effect of the instruments made by them. Through it Mrs. McGlone has been relieved of the obligation of her contract although she received its benefits, and one half of Mr. McGlone's estate has been taken from his sister, brothers and nephews and will be paid to the next of kin of Mrs. McGlone, notwithstanding her agreement renouncing all interest in her husband's estate.

POINT B.

UNDER THE INSTRUMENT OF FEBRUARY 2, 1922 WHICH WAS ACTED UPON BY MR. McGLONE AT THE TIME OF THE MARRIAGE ON FEBRUARY 4, 1922, HE ACQUIRED A VESTED RIGHT TO EXCLUDE MRS. McGLONE FROM CLAIMING ANY INTEREST IN HIS ESTATE.

Assuming, as the Court of Appeals did, that the instrument of waiver evidences a contract between persons in contemplation of marriage within the meaning of the Domestic Relations Law, that it is executed in a manner which satisfies the requirements of the Personal Property Law, and that the contractual rights created by that instrument are within the protection of the constitutional guaranty against impairment of obligations of contract and the taking of property without due process of law, it seems obvious that upon the consummation of the marriage Mr. McGlone acquired some definite right and Mrs. McGlone assumed a definite obligation.

What was her obligation under the contract? By its express terms she irrevocably renounced all right, title and interest she might, legally or otherwise, have in any estate, real or personal, of which Mr. McGlone might die seized.

Under the law in effect at the time this agreement was made, Mrs. McGlone's intestate share in the personal property of Mr. McGlone was substantially the same as that provided by the subsequent enactment (former Sec. 98, Sub. 2, Decedent Estate Law, and present Sec. 83, Sub. 4, Decedent Estate Law, effective Sept. 1, 1930). She also then had a right of dower in Mr. McGlone's real property (former Sec. 190, Real Property Law).

Her agreement, however, was not limited to a waiver of dower, nor was its efficacy dependent upon Mr. McGlone dying intestate. It did not obligate him to make a Will, or bequeath his property in a certain manner, nor did it restrain him from making a Will. It did not authorize the performance of an unlawful act, nor was it inconsistent with the power of the Legislature to fix the rights of descent and distribution. The interest in his estate she would have acquired, but for her agreement, could be diminished or enlarged by subsequent legislation, without affecting her rights in any way, because she had released all interest in his property. Nor could the Legislature, without constitutional infringement, give her any rights in derogation of the vested contract rights which the testator and his estate had already acquired.

Coolidge v. *Long*, 282 U. S. 582.

The contention of the Court of Appeals that an agreement waiving all interest in the estate of a prospective spouse is not effective as a release of the right of succession to property which the Legislature might thereafter create, flies in the face of the clear language of the agreement, the rights and obligations created thereby, and the rules of law governing antenuptial agreements which have been recognized and enforced from the earliest times. This very question was

considered in the case of *Matter of Smith*, 243 App. Div. 348. In a unanimous decision that Court said at pages 351, 352:

> "The statutory right which is invoked by the appellant is a part of an act passed by the Legislature in 1929, in effect September 1, 1930, and did not exist when the mutual release in question was executed. That fact alone, however, does not make the instrument inoperative as a release or waiver of appellant's right.
>
> "If the execution of this release was the free and unrestrained act of the appellant, and if her intention to relinquish every right which she had or might thereafter have in her husband's estate is clear and certain, then, undoubtedly, the instrument will prevent her from taking advantage of her statutory privilege of election, even though that right did not exist at the time of the execution of the release."

A person has a fundamental right to waive any right he has whether secured to him by contract, conferred upon him by statute, or guaranteed to him by the Constitution, except in cases where public policy intervenes.

> *People, ex rel. McLaughlin* v. *Police Commissioners*, 174 N. Y. 450.

And there is no rule of law or principle of public policy which prevents husband and wife from relinquishing by agreement before marriage the rights in each other's property which they would otherwise acquire by virtue of the marriage. If freely and intelligently made such agreements are conducive to marital tranquillity. To treat the right to so contract destructively would discourage entry into the marriage state in many instances, especially in a case such as this. Mrs. McGlone was sixty-two years old, she had two previous marital experiences, she had no children and was a woman of independent means. The companionship of her prospective husband and the comforts of home life must have been her paramount object in marrying him. The capacity to

settle in advance questions of property rights may be the turning point of such a marriage. Mrs. McGlone achieved her status as a result of her agreement not to claim any part of her prospective husband's estate. Having thus achieved her position, a change in her attitude amounts in effect to a fraud upon him and his estate. The parties cannot, of course, be placed in *status quo*, but the Court can and should exercise its unquestioned equitable power to prevent the consummation of this fraud.

When one relinquishes all interest in the estate of another, the nature of the right at the time of death, had it not been released, is immaterial. The question is one of intention of the parties. The decision of the Court of Appeals is not based upon any ambiguity in the language of the agreement, nor is there any basis for such a contention. There is no question that Mrs. McGlone intended to relinquish all interest in Mr. McGlone's estate. In effect, she agreed not to claim any interest upon his death. Williston on Contracts (Rev. Ed.), Sec. 1823, states: "There is no doubt in modern times that an attempted release of a future right must be construed as amounting at least to a covenant not to enforce the right whenever it arises." His right to exclude her from any share of his estate, and to prevent her from claiming an interest therein in violation of the agreement, was invaded by the subsequent enactment and taken without due process of law. That right vested upon the consummation of the marriage, and should be enforced in accordance with the terms of the contract and intention of the parties.

POINT C.

THE INSTRUMENT EXECUTED BY MRS. McGLONE COMPLIES WITH THE REQUIREMENTS OF SUB. 9, SEC. 18, OF THE DECEDENT ESTATE LAW, SO FAR AS THE SAME IS VALID.

The statute is quoted at pages 14 and 15 above. The first sentence of the section mentions "an instrument" of waiver

against a particular Will and an "agreement" of waiver against any Will. From this the appellee, in the courts below, attempted to draw far-fetched inferences as to the nature of the document to be employed. The history of the section shows that any type of agreement is proper. As noted above, originally it provided that an election to take against any Will might be made in "an agreement of settlement". This later was amended by deletion of the words "of settlement" and by the addition of the second sentence providing that a *waiver* or *release* of all rights, executed before the taking effect of the section, shall be deemed "to release the right of election". The intention was to remove all limitations on the type of document to be employed. Although the statute uses the term "agreement", it does not limit the scope of the word in any respect. There is no requirement that the agreement be "mutual" or "bi-lateral". The statute does not require the complete terms of the arrangements between the parties to be set forth, nor that a consideration be stated. The word "agreement" must be construed in the light of the field in which it is used, and essentially the term here means an agreement on the part of the surviving spouse surrendering his or her right, and the signature of such spouse alone is sufficient. In other words all the statute requires is a written instrument subscribed by the person to be charged therewith, waiving or releasing all rights in the estate of the other spouse. No further conditions are imposed by the statute. The statute provides that an instrument to this effect shall be deemed to release the right of election. The Court has no authority to add other conditions.

This very question was raised in the case of *In re Moore's Estate*, 165 Misc. 683, aff'd. 254 App. Div. 856, aff'd. 280 N. Y. 733, referred to on page 15 above. In that case the document in question read as follows:

> "The right of election to take against any Last Will and Testament executed by my wife, Edna Bradley Moore, pursuant to the provisions of Section 18 of the Decedent's Estate Law of the State of New York, as

amended by the Laws of 1929, Chapter 229, is hereby waived.

In Witness Whereof, I, the undersigned, husband of the above named Edna Bradley Moore, do hereby set my hand and seal this 24th day of May, 1935.

(Signed) RAYMOND W. MOORE

(Seal)"

This document, it will be noted, was not addressed to a particular will, but to *any* will. It does not set forth the complete terms and arrangements between the parties. It does not state a consideration, and it is signed only by the surviving spouse. Having been executed after the effective date of the statute, it is of course, acknowledged. The Surrogate held that the surviving spouse had waived his right of election. The Appellate Division affirmed unanimously, and the Court of Appeals affirmed with but one dissenting vote. On the question discussed above, Surrogate Foley said:

> "It will be noted that the section refers to an 'instrument' as the form of waiver to be executed against a specific will, and employs the word 'agreement' in reference to the form of the paper to be employed as a waiver of the right to elect against any will. The chief reliance of counsel for the husband sustaining his right to elect, in the face of the formal waiver executed by him, is the alleged distinction between these two terms. By highly refined, technical, tenuous arguments it is asserted that the word 'agreement' in the statute compels the making of a complete contract, that both husband and wife are required to execute the single instrument, and that the complete terms of the arrangements between the parties and the actual consideration must be set forth. These contentions are overruled.
>
> "The history of the preparation of the section by the Decedent Estate Commission, its original enactment by the Legislature in 1929, and the subsequent amendment made in 1930, all negative the interpretation of its terms urged by counsel for the husband here."

The Surrogate then discussed the history of the section and purpose of the amendments, as noted on page 15 above, following which he added:

> "Again the word must be inferred to have been used in the statute in the sense that is customarily employed in the nomenclature of the law of estates. There are many forms of such agreements constantly presented for consideration in the Surrogate's Courts and considered in the decisions of this court and the Appellate Courts. None of these instruments is required to be signed by all of the parties involved in the estate or even by two parties where the transaction is limited to that number. This group of instruments is composed of agreements to assign legacies or interests in estates specifically mentioned in section 32 of the Personal Property Law under the article of that statute entitled 'Agreements in writing'. Again there are agreements to renounce legacies, agreements to waive a fiduciary's commissions, agreements releasing fiduciaries from liability to account or approving a specific account and waiving its judicial settlement, section 251, Surrogate's Court Act, agreements releasing the surety on the bond of a fiduciary, agreements as to gifts and donations, agreements by a creditor relinquishing a claim against an estate or compromising such a claim. It should be noted also in the majority of these forms of relinquishment and releases, the instrument signed by the party surrendering the right to litigate seldom states the consideration paid in money or property. Nevertheless, they are supported in the courts as valid and effective. * * *
>
> "I find no intent whatsoever to limit the word 'agreement' in the statute to a formal contract executed by both spouses. 'The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day.' Cardozo, *J.*, in *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 91, 118 N. E. 214. * * *
>
> "The rights granted by the section might be waived by an instrument as to any single will and by an equally simple form of instrument against any will. * * * The terms of the section are not to be perverted

> to permit a person of designing disposition, who has signed away his rights, to escape the effect of the instrument made by him."

This view is also in accord with the law as it existed before the enactment of Sec. 18 of the Decedent Estate Law. Under pre-existing statutes a unilateral agreement affecting the marriage relation or rights thereunder, when acted upon, was valid and enforceable (Sec. 31, Sub. 3, Personal Property Law, *Wright* v. *Wright*, 54 N. Y. 437). The Appellate Division so held in the case at bar. The Court of Appeals did not disagree with this conclusion, having theretofore recognized the validity of such an agreement in *Matter of Moore* discussed above.

POINT D.

THE INSTRUMENT OF FEBRUARY 2, 1922 WAS MADE TO INDUCE THE MARRIAGE—IT HAD A VALID CONSIDERATION—THE MARRIAGE CONSTITUTED THAT CONSIDERATION.

It appears from the face of this document that it was made by Mrs. Snyder "on the eve" of her marriage to Mr. McGlone; it recites the coming marriage on February 4, 1922 and clearly was made in contemplation thereof. This construction was accepted by the Court of Appeals. In its statement of the facts that Court said (R., 50), "On February 4, 1922, the decedent, John J. McGlone, and Helena Day Snyder were married in England. In contemplation of that marriage Helena Day Snyder, on February 2, 1922, signed a paper writing which, it has been held, bars her right to take a share in her husband's estate." The instrument further recites that it was made "for good and sufficient reasons", that its maker is "of sound mind" and in possession of all her faculties, that she is possessed of a fortune of her own, that the execution of this instrument is an act of her "own free will", and that she thereby voluntarily and irrevocably

renounced all right, title and interest she might legally or otherwise have in any real or personal property of which her prospective husband might die seized.

That the instrument was made to induce the marriage becomes even more evident when we recall the circumstances of the parties. When she made this agreement Mrs. McGlone was certainly not lacking in experience or suffering from inequality. This was her third marital venture and Mr. McGlone's first. The marriage record discloses that she gave her age as forty-five when in fact she was sixty-two. She had no children, and was a woman of independent means.

The form of the agreement indicates that the parties believed there was a consideration and intended to affect their legal relations. "One does not commonly pledge one's self to generosity in the language of the covenant." Cardozo, *J.*, in *DiCicco v. Schweizer*, 221 N. Y. 431, 438.

The natural consequence of Mrs. Snyder's promise was to induce the marriage. Until the marriage occurred she was not bound. The failure to marry would have made the promise ineffective. From that moment there was no longer a real alternative, or as Judge Cardozo expressed it, "There was no longer what philosophers call a 'living' option. This in itself permits the inference of detriment." In *Smith v. Chadwick*, 9 App. Cas. 187, 196 (Eng.), Lord Blackburn said: "I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement."

The Appellate Division found as a fact that the instrument was signed to induce the marriage (R., 45), and that the marriage was the consideration (R., 48). The Court of Appeals expressed no disagreement with this conclusion.

In the case of *In re Scott, et al.*, 173 App. Div. 270, it appeared that the decedent married one Jeanie Graves, and that an antenuptial agreement had been made the day before the marriage. It recited that "whereas, and in view of"

her being marr to him on the 13th inst., and the fact that a widow under the laws of the United States can claim a third interest in her husband's estate, and that he had made a Will giving his real estate to his four children, that she thereby relinquished any and all claims she may have as his wife to her thirds in the real estate mentioned. The Surrogate had held the agreement invalid on the ground that the widow had received no consideration therefor or for the purported relinquishment of her dower rights in the real estate. The Appellate Division reversed the decision of the Surrogate, saying:

> "The fact that the agreement was made the day before the marriage, and in view of it, indicates clearly that the marriage was a part of its consideration, * * *."

and

> "We have held that the inference follows the agreement that it was made in consideration of the marriage."

The views of the Appellate Division in this case, and of the Court in *Matter of Smith*, above, represent the prevailing rule of law. An express statement of the consideration is unnecessary even in an ordinary contract (*Church* v. *Brown*, 21 N. Y. 315, 316), but this is especially true of marriage contracts. Where marriage is the consideration it need not be recited in the antenuptial agreement, and the latter will be enforceable so long as the marriage is actually solemnized. (*Moore* v. *Harrison*, 26 Ind. App. 408 at 411; *Richard* v. *Detroit Trust Co.*, 269 Mich. 411; *McNutt* v. *McNutt*, 116 Ind. 545; *Naill* v. *Maurer*, 25 Md. 532.) Even promises which are intended as gratuitous are enforceable when a marriage has taken place thereon (Williston on Contracts, Sec. 139, pp. 500-1, Sec. 486, pp. 1396-7).

Marriage in contemplation of law is not only a valuable consideration to support a contract between the parties to it, but a consideration of the highest value, and from motives of the soundest public policy is upheld with steady resolu-

tion. The parties to such a contract are deemed, in the highest sense, purchasers for value.

Magniac v. *Thompson*, 7 Pet. 348;
Previt v. *Wilson*, 103 U. S. (13 Otto) 22;
DeCicco v. *Schweizer*, 221 N. Y. 431, 438, 440.

In the courts below, the appellee contended that even if the parties to the contract considered the marriage to be the consideration this was insufficient since the parties had already agreed to intermarry. There is no evidence in the record which indicates that the engagement of the parties antedated the agreement of waiver or release. On the contrary, on the admitted facts, it is clearly evident that the agreement was made to induce the marriage. But aside from this, it has been repeatedly held that although the intended spouses may have been affianced prior to the execution of the antenuptial agreement, the consideration is not thereby vitiated, and the obligation of the promisor becomes binding immediately upon the marriage (*McNutt* v. *McNutt*, 116 Ind. 545; *Appleby* v. *Appleby*, 100 Minn. 408 at 428; *Bibelhausen* v. *Bibelhausen*, 159 Wisc. 365; *Hockenberry* v. *Donovan*, 170 Mich. 370). The usual form of marriage contract invariably recites that a marriage is intended to be solemnized, and that "in further performance of said agreement and in consideration of the said intended marriage it is hereby agreed and declared," etc. (Vaizey on Settlements, p. 108). These marriage contracts have nevertheless always been enforced by the Courts. Furthermore, until the marriage Mrs. McGlone had no rights to surrender in Mr. McGlone's property. There was only an offer by her to give up her rights if and at such times as the parties should marry. The marriage constituted an acceptance of the offer, and having received the benefits thereof, she is bound by her promise.

Even if there had been a prior engagement, the written instrument executed by her on February 2, 1922 merged mere oral negotiations, expressed the matured understanding of the parties and supplies the best evidence upon the subject

of property rights (*Appleby* v. *Appleby*, 100 Minn. 408, 429). As expressed in *McNutt* v. *McNutt*, 116 Ind. 545 at 559, "if parties put in writing their agreement concerning property and subsequently marry, the agreement, as written, is the source of evidence and furnishes conclusive proof of the matured and final contract." There is, however, no evidence in the record that an agreement to marry preceded the agreement of release made on February 2, 1922.

The February 2, 1922 instrument therefore had a valid consideration — the marriage constituted that consideration.

POINT E.

THE RIGHTS CREATED BY THE AGREEMENT IN THE CASE AT BAR ARE WITHIN THE CONSTITUTIONAL GUARANTY AGAINST IMPAIRMENT OF THE OBLIGATIONS OF CONTRACT AND TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A release of a future right amounts to a covenant not to enforce the right whenever it arises. Such release may be in the form of a waiver or of a promise. In any case it is given the effect of a contract not to assert a right of the sort described (Williston, Contracts, Rev. Ed., Sec. 1823).

The instrument executed by Mrs. McGlone on February 2, 1922 and acted upon by Mr. McGlone at the time of the marriage, constituted a contract. Whether it be deemed an agreement, a grant, release or even a gift, the rights which vested thereunder in the testator could not be destroyed by retrospective state legislation.

In *Coolidge* v. *Long*, 282 U. S. 582, the appellants appealed from a decree of the Probate Court assessing an inheritance tax. The validity of the statute imposing such tax was questioned on the ground that it was repugnant to the contract clause of the Federal Constitution and the due process and equal protection clause of the Fourteenth Amendment. The

appellants were trustees under a deed and declaration of trust executed on July 20, 1907, by J. Randolph Coolidge and Julia Coolidge, by which deed large amounts of real and personal property were transferred to the trustees by the settlors *voluntarily and without consideration*. The trustees were given extensive powers of management and investment; the income was to be paid to the settlors during their lives and the principal thereafter divided equally among their five sons. There was no power of revocation, modification or termination. Mrs. Coolidge died in January, 1921 and Mr. Coolidge died on November 10, 1925. The five sons survived the settlors. When the declaration of trust was executed, no statute was in effect under which the succession to the trust property could have been subject to the inheritance tax. This Court held that the statute imposing the tax impaired vested rights and was repugnant to the contract clause of the Constitution and the due process clause of the Fourteenth Amendment. At page 595 the Court said:

> "*The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution.* * * *
>
> "This Court has held that the Revenue Act of 1914, Sections 319-324, in so far as it undertook to impose a tax on *gifts* fully consummated before its provisions came before Congress (*Blodgett* v. *Holden*, 275 U. S. 142), or before its passage (*Untermeyer* v. *Anderson*, 276 U. S. 440), was arbitrary and repugnant to the due process clause of the Fifth Amendment. * * *
>
> "By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. *It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor.*"

Upon the consummation of the marriage Mr. McGlone acquired, under the instrument of February 2, 1922, the right to prevent Mrs. McGlone from claiming a part of his estate upon his death. This was an immediate and fixed or vested right of future enjoyment. Mrs. McGlone became obligated to

perform her promise not to claim any of the real or personal property of which he might die seized. This was a contract concerning property and conferring rights which may be asserted in a court of justice. As such, it came within the constitutional provision against laws impairing obligations of contract.

Dartmouth College v. *Woodward*, 4 Wheat. 518.

Any change in the law which materially impaired the means of legally enforcing the agreement of waiver, necessarily altered and impaired its obligation, in violation of the Constitution.

Sturges v. *Crowinshield*, 4 Wheat. 122.

The right to enforce Mrs. McGlone's promise not to claim any part of her husband's estate was destroyed by the subsequent enactment recognizing such an agreement only if executed with the formalities set forth in the new statute. This was taking one man's property for another's benefit without compensation, in violation of the due process clause of the Fourteenth Amendment (*Holden* v. *Hardy*, 169 U. S. 366).

POINT F.

THE AGREEMENT HEREIN CONSTITUTED A DELIBERATE AND INFORMED ABANDONMENT OF KNOWN RIGHTS—MR. McGLONE ALTERED HIS POSITION RELYING THEREON—MRS. McGLONE WAS ESTOPPED FROM ASSERTING THE RIGHT TO ELECT TO TAKE AGAINST HIS LAST WILL AND TESTAMENT.

In *Alsens A. P. C. Works* v. *Degnon Cont. Co.*, 222 N. Y. 34 at 37, the Court of Appeals defined a waiver as follows:

> "A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but

> for such waiver, the party would have enjoyed. It is the voluntary act of the party and does not require or depend upon a new contract, new consideration or an estoppel. It cannot be recalled or expunged. (*Hotchkiss* v. *City of Binghamton*, 211 N. Y. 279; *Clark* v. *West*, 193 N. Y. 349; *Draper* v. *Oswego Co. Fire Relief Assn.*, 190 N. Y. 12; *Zwietusch* v. *Luehring*, 156 Wis. 96.) It is essentially a matter of intention"

In the case at bar the instrument signed by Mrs. McGlone contains internal evidence that she was "of sound mind" and in possession of all her faculties when she executed the same; that it was an act of her "free will"; that she was possessed of an independent fortune; and that she understandingly renounced any interest in her prospective husband's estate. These recitals were equivalent to affirmative proof. If they were untrue the evidence thereof must have been available to Mrs. McGlone. She offered no evidence. The denials in her answer were not equivalent to proof. These recitals must therefore be accepted as true, and the agreement construed as an express and deliberate abandonment of her rights.

The Appellate Division found, and the evidence clearly indicates, that the agreement was made to induce the marriage. Mr. McGlone twice altered his position relying thereon. First, by marrying her, and second, by the execution of a Codicil to his Will, after the effective date of the new statute. His Last Will and Testament refers to the agreement (R., 13), and clearly evidences his reliance thereon. Had he not thereafter executed the Codicil, the right to elect created by Sec. 18 of the Decedent Estate Law would not have applied to this Will. The Court of Appeals conceded (R., 53) that Mr. McGlone would not have executed the Codicil to the Will if he had known his widow might on that account claim an interest in his estate. The only reasonable inference one can draw from this is that Mr. McGlone considered the agreement to be a valid release of all interest in his estate, and relying thereon executed the Codicil. Under the circum-

stances, it is submitted that Mrs. McGlone was estopped from asserting any claim to the real or personal property of which Mr. McGlone died seized.

Viewing the matter from the standpoint of justice and equity, it is little short of monstrous that having made this agreement with her eyes wide open, Mrs. McGlone should be permitted, after her husband's death, to repudiate the arrangement into which she voluntarily entered. The decision of the Court of Appeals that the facts herein did not give rise to an estoppel or other equitable ground for denying to Mrs. McGlone her statutory right of election, if permitted to stand, will serve as a veritable bulwark of protection for fraud.

POINT G.

APPELLANTS MADE OUT A PRIMA FACIE CASE UPON THE TRIAL, AND SINCE MRS. McGLONE FAILED TO PRESENT ANY PROOF, APPELLANTS WERE ENTITLED TO A DECREE AS PRAYED FOR IN THE PETITION.

Appellants rested upon the admissions in the pleadings, and three exhibits, consisting of the stipulation amending Mrs. McGlone's answer, by which she admitted that she made and delivered the agreement in question to Mr. McGlone at the time of its execution, the agreement itself, and the marriage certificate.

Mrs. McGlone offered no proof.

Upon this demonstration appellants made out a *prima facie* case. The burden of going forward with evidence shifted to Mrs. McGlone. Since she failed to offer any proof, appellants were entitled to a decree as prayed for in the petition.

Murray v. *Narwood*, 192 N. Y. 172 at 177, 178;
Whitlach v. *Fidelity and Casualty Co.*, 149 N. Y. 45 at page 50.

In the courts below the appellee contended that by reason of the relation of the parties it was necessary for appellants to affirmatively prove that there was no inequality, fraud or overreaching. There is no basis for this contention, as the Appellate Division found and held. The Court of Appeals expressed no disagreement with the views of the Appellate Division on this point. It is the law of the case that no presumption exists by reason of the relation of the parties, and that the burden of pleading inequality, fraud or overreaching is upon the widow (*In re McGlone's Will*, 256 App. Div. 1074). There was no issue of fraud, inequality or overreaching here, because it was not pleaded. Even if Mrs. McGlone had so pleaded, appellants would not have been required to prove she was not deceived or coerced, unless Mrs. McGlone first went forward with evidence indicating that she dealt with her prospective husband under circumstances of inequality. The mere fact that she released all rights in his estate is not sufficient.

Mrs. McGlone lacked neither years nor experience. She had reached that age when sentimental considerations in new marital undertakings are supposed to have little weight. The contract is one that persons advanced in life could with great propriety make, especially where one or both of the parties have previously been married. It is difficult to believe she was misled as to the contents of the agreement.

When a person signs an agreement such as this, some sanctity must be attributed to the act of signing. It may not be regarded merely as a lesson in penmanship. In the absence of evidence showing fraud or mistake, the signor is charged with knowledge of the character and contents of the instrument. The unchallenged proof that the instrument was genuine was sufficient to establish *prima facie* that it was binding upon Mrs. McGlone.

Pimpinello v. *Swift & Co.*, 253 N. Y. 159, 162;
Matter of Stone, 272 N. Y. 121, 124.

If Mrs. McGlone had in fact dealt with her prospective husband under circumstances of inequality or lack of understanding as to the nature of her act, the proof thereof was undoubtedly readily available to her. She offered no proof, and appellants were therefore entitled to judgment.

CONCLUSION.

Measuring this contract by the rules of law, reading it by the light of the attending circumstances, and looking to the object the parties intended to accomplish, there can be no doubt as to the effect that should be given its provisions. Its plain purpose was to remove all claim to Mr. McGlone's property. It would be a travesty on justice if this purpose is frustrated.

It is respectfully submitted that the order of the Court of Appeals, and the decree entered thereon, should be reversed.

Respectfully submitted,

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Counsel for Appellants,
Irving Trust Company and Thomas
F. McGlone, Jr., as Executors, etc.,
Rose McGlone Meredith and Thomas F. McGlone.